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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994.

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MITCHELL W. ADAMS, COMMISSIONER
OF REVENUE OF MASSACHUSETTS,
*Petitioner*,

*v.*

PERINI CORPORATION, ET AL.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## Question Presented

Whether the Commerce Clause permits a State to give domestic and foreign corporations substantially equal but not identical tax deductions for the value of their subsidiaries, where the state excise tax on domestic and foreign corporations is otherwise equal.

## List of Parties

The parties to the proceeding below were petitioner Mitchell W. Adams, in his official capacity as Commissioner of Revenue of Massachusetts, and respondents Perini Corporation, Perini Land and Development Corporation, Dynatech Corporation, and Neworld Bancorp, Inc.

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PERINI CORPORATION, et al.,
Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Pursuant to United States Supreme Court Rules 10 and 12, petitioner Mitchell W. Adams, Commissioner of Revenue of Massachusetts, respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered in this case on March 22, 1995.

## Opinions Below

The opinion of the Supreme Judicial Court is reported at 419 Mass. 763, 647 N.E.2d 52 (1995). It is reprinted in the Appendix hereto, A-1—A-11.

## Jurisdiction

The Supreme Judicial Court issued its opinion and judgment on March 22, 1995. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1988).

## Statutes and Constitutional Provisions Involved

Massachusetts Gen. Laws (M.G.L.) c. 63, § 30(8) and (9)(West 1988 ed. and 1995 Supp.), are set forth in the appendix hereto at A-12 *et seq.*

The Commerce Clause, U.S. Const. Article I, § 8, cl. 3, provides in relevant part that "Congress shall have power . . . to regulate commerce . . . among the several States . . . ."

## Statement of the Case

Massachusetts imposes an excise tax on Massachusetts (domestic) and non-Massachusetts (foreign) corporations for the privilege of doing business in the Commonwealth. Domestic and foreign "intangible property corporations" (defined in M.G.L. c. 63, § 30(11)) (see A-3 n.3) pay an excise calculated by percentages of their net income and their net worth. M.G.L. c. 63, §§ 32 and 39. The calculation of the net income derived by domestic and foreign corporations from business in the Commonwealth is the same. M.G.L. c. 63,

§ 38. The excise tax rate applied to the net income of domestic and foreign corporations is the same. M.G.L. c. 63, §§ 32, 39.

Similarly, for domestic and foreign intangible property corporations, the initial calculation of net worth (assets minus liabilities) is the same. M.G.L. c. 63, §§ 30(8) and 30(9). And the tax rate applied to net worth is the same. *Id.*, §§ 32, 39.

The statutes also permit both domestic and foreign corporations to deduct from their taxable net worth the value of certain subsidiaries of which the taxpayer owns 80 per cent or more of the voting stock. A domestic corporation may deduct the value of such a subsidiary only if the subsidiary is incorporated in Massachusetts. M.G.L. c. 63, § 30(8). A foreign corporation may deduct the value of such a subsidiary only if it is incorporated outside Massachusetts and does no business in Massachusetts. M.G.L. c. 63, § 30(9).

Respondents are all intangible property corporations as defined in M.G.L. c. 63, § 30(11). A-4. Each conducts business in Massachusetts and is subject to the corporate excise. *Id.* Each is also a parent corporation which owns 80 per cent or more of the voting stock of one or more subsidiaries. *Id.*

Two respondents, Perini Corp. and Dynatech Corp., are Massachusetts corporations with subsidiaries incorporated both in and outside Massachusetts. *Id.* The other two respondents, Perini Land and Development Corp. (PL&D) and Neworld Bancorp, Inc. (Neworld), are both foreign corporations each of which wholly owns a subsidiary incorporated in Massachusetts. *Id.* The record also includes evidence of foreign companies who have deducted the value of foreign subsidiaries that do no

business in Massachusetts. Each respondent has applied to the Massachusetts Department of Revenue for abatement of certain corporate excise taxes paid in prior years. A-2 n. 2.

Respondents commenced this action in 1993 in the Massachusetts Supreme Judicial Court for Suffolk County, the trial session of the Commonwealth's highest court. A-2. Respondents claimed that the deductions at issue violate the Commerce and Equal Protection Clauses of the United States Constitution. Respondents sought declaratory and injunctive relief under state law and injunctive relief and attorney's fees under 42 U.S.C. §§ 1983 and 1988 (1988). The court reserved and reported the case to the Supreme Judicial Court for the Commonwealth on the pleadings and a statement of agreed facts. *Id.*

On March 22, 1995, the Supreme Judicial Court held that "the challenged provisions of the corporate excise, G.L. c. 63, § 30(8) and (9), facially discriminate against interstate commerce in violation of the Commerce Clause." A-2. The court first determined that the challenged portions of the excise "ha[ve] a sufficient effect on interstate commerce to evoke commerce clause scrutiny." A-4. The court next held that the deductions facially discriminate against interstate commerce. A-6. The court rejected the argument that the statute does not discriminate because it allows domestic and foreign taxpayers each to deduct the value of "matching" subsidiaries. A-7. The court took this argument to be one that "the deduction given to foreign corporations for certain foreign subsidiaries adequately compensates for the deduction given to domestic corporations for domestic subsidiaries." *Id.*

The court next considered the argument of the Commonwealth that the deduction in section 30(9)(for a foreign

subsidiary of a foreign parent) encourages foreign companies doing business in Massachusetts to organize and conduct the business of its subsidiaries *outside* Massachusetts, and therefore does not discriminate against interstate commerce. The court said that the argument "failed to persuade" it for two reasons. First, it said, without explanation, that, "because the net worth formulas for domestic and foreign corporations differ, the deduction given to a foreign corporation for a matching subsidiary is less favorable than that given to a domestic corporation." A-7—A-8. Second, the court held that "even assuming that the deductions are substantially equal, the statute as a whole still places an impermissible burden on interstate commerce." *Id.*

Finally, the court below held that the two legitimate purposes for the deductions did not save them under the Commerce Clause. The court acknowledged that the "domestic-domestic" deduction is Section 30(8) furthers the legitimate state interest in avoiding double taxation. The court held, however, that this deduction is not "narrowly tailored to serve that interest" because "the problem of double taxation persists for multi-State corporate families." A-9.

The court likewise rejected reliance on the legitimate purpose of the "foreign-foreign" deduction in Section 30(9). The deduction in Section 30(9) recognizes that Massachusetts may not have power under the Constitution to tax a foreign subsidiary of a foreign corporation where the subsidiary (1) is not incorporated here, and (2) does no business here. The court below did not hold such a purpose illegitimate, but rather held that it "fails to address why it is necessary to treat a foreign corporation with a Massachusetts subsidiary less favorably than a similarly situated domestic corporation." A-9 n. 8.

The court below did not reach respondents' claim under the Equal Protection Clause. A-10. The court reserved respondents' request for attorney's fees. A-10—A-11 (citing *National Private Truck Council* v. *Oklahoma Tax Comm'n*, 879 P.2d 137 (Okla. 1994), *cert. granted*, 115 S. Ct. 714 (1995)).

## Reason for Granting the Writ

The Court should grant the petition to clarify that a State may, consistent with the Commerce Clause, give domestic and foreign corporations substantially equal but not identical deductions from a state tax, where the tax on such corporations is otherwise equal.

Alternatively, the Court should postpone action on the petition pending a decision by the Court in *Fulton Corp.* v. *Faulkner, Secretary of Revenue of North Carolina*, No. 94-1239, *cert. granted*, 115 S. Ct. 1689 (1995). If the Court affirms the decision below in *Fulton*, then it should grant this petition, vacate the judgment below, and remand for further consideration in light of *Fulton*.

### I. THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW SIMILAR TO THAT PRESENTED IN *FULTON CORP. V. FAULKNER*, NO. 94-1239: WHETHER THE COMMERCE CLAUSE PERMITS A STATE TO GIVE DOMESTIC AND FOREIGN CORPORATIONS SUBSTANTIALLY EQUAL BUT NOT IDENTICAL DEDUCTIONS FROM OTHERWISE EQUAL STATE TAXES.

The Court should grant the petition because it presents an

important question of federal law similar to that presented in *Fulton Corp.* v. *Faulkner*, U.S. Supreme Court No. 94-1239: whether the Commerce Clause permits a State to give domestic and foreign corporations substantially equal but not identical deductions for the value of their subsidiaries, where the taxes on the corporations are otherwise equal.

In *Fulton*, the North Carolina Supreme Court rejected a Commerce Clause challenge to certain deductions from state taxes on dividend income and the value of corporate stock, where the amount of the deductions increased according to the amount of net income taxes paid to North Carolina by the issuing corporations. The North Carolina Supreme Court upheld the deductions under the Commerce Clause because they "compensated for the net income taxes paid to North Carolina by the issuing corporations" and there was "substantial equality" in the treatment of domestic and foreign commerce. *Fulton Corp. v. Justus*, 450 S.E.2d 728, 731-734 (N.C. 1994).

The North Carolina Supreme Court rested its holding in part on *Darnell* v. *Indiana*, 226 U.S. 390, 397-398 (1912). In *Darnell*, the Court found "substantial equality" of state taxes, sufficient to satisfy the Commerce Clause, where Indiana taxed shareholders on the value of their stock in foreign corporations that did not pay property taxes in Indiana, while exempting from tax shareholders of stock in Indiana corporations that paid property taxes in Indiana. The North Carolina court held that the North Carolina tax scheme read as a whole was the "very kind of 'compensating' tax scheme the Supreme Court upheld in *Darnell.*" *Fulton Corp.* v. *Justus*, 450 S.E.2d at 732. Thus, the North Carolina court recognized that the Commerce Clause does not forbid different tax treatment of intra- and

interstate commerce, where (1) such treatment is different but equivalent (such as in the case of sales and use taxes)[1] or (2) as in *Fulton* and *Darnell*, where such treatment is "substantially equal."

### A. *The Test Applied by the Court Below Conflicts with the Test Applied in Darnell and Fulton.*

The Supreme Judicial Court of Massachusetts failed to judge properly whether the deductions for "matching subsidiaries" were substantially equal. The court below merely stated, without explanation, that "because the net worth formulas for domestic and foreign corporations *differ*, the deduction given to a foreign corporation for a matching subsidiary is *less favorable* than that given to a domestic corporation." A-7—A-8 (emphasis added). The test applied by the court below — whether a deduction "differs" or is "less favorable" — conflicts with the test applied in *Fulton* and *Darnell*. Whether a deduction is "less favorable" is virtually a requirement that tax treatment be identical. Moreover, the outcome under such a test could turn on the unique facts presented by each taxpayer. Such a test might invalidate laws which are valid under the test of "substantial equality" applied by *Darnell* and the North Carolina court in *Fulton*. The test applied by the court below thus conflicts with the test applied in *Darnell* and *Fulton*. The Court should grant the petition to

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[1] *See, e.g., Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937); *Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815 (1994).

resolve the conflict.

### B. *The Court Below Misapplied the "Internal Consistency" Test.*

The decision of the Supreme Judicial Court is also inconsistent with decisions of this Court applying the so-called "internal consistency" test. See A-8. The court below stated that, "even assuming that the deductions given for matching subsidiaries are substantially equal, the statute as a whole still places an impermissible burden on interstate commerce." A-8. The court stated that, under the "internal consistency test," a "'tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* (quoting *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984)). The court below concluded that "if every State applied a similar excise, the acquisition of foreign subsidiaries would be reduced and multi-State corporate structures would be significantly burdened." A-8.

This conclusion ignores the substantial equivalence and legitimate effect of the foreign-foreign deduction in M.G.L. c. 63, § 30(9). Whatever the effect of the domestic-domestic deduction, there is no question that a foreign parent is encouraged by the foreign-foreign deduction to acquire or create its subsidiaries in any one of the fifty States other than Massachusetts. The Commerce Clause simply does not forbid a law that encourages a company to do business outside the taxing state.[2] Thus, the foreign-foreign deduction, standing

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[2] The Massachusetts scheme thus differs from the scheme struck down in *Tyler Pipe Industries* v. *Dep't of Revenue*, 483 U.S. 232 (1987). There, the vice of the Washington tax scheme

alone, does not violate the internal consistency test.

The crucial question in this case is, accordingly, whether the deductions *considered together* violate the internal consistency test. The court below, however, failed to review the domestic-domestic deduction "in light of its actual effect considered *in conjunction with other provisions* of the State's tax scheme." *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981)(emphasis added). The court failed to give proper weight to the substantial equivalence of the plainly valid foreign-foreign deduction. Accordingly, the Court should grant the petition to clarify that the internal consistency test must be applied to the whole of the relevant statutory scheme and with due regard to the substantial equality of taxes on intra- and interstate commerce.

## Conclusion

For the reasons stated above, the Court should grant the petition. Alternatively, the Court should postpone action on the petition pending a decision by the Court on the merits in *Fulton Corp.* v. *Faulkner, Secretary of Revenue of North Carolina*, No. 94-1239, *cert. granted*, 115 S. Ct. 1678 (1995).

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was that the "exemption *only* operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are *both* carried out within the [taxing] State." *Id.* at 246 (emphasis added). Here, the Massachusetts exemption reduces taxation of domestic *and* foreign companies through complementary deductions for substantially equivalent acts "carried on within" *or without* the taxing state.

If the Court affirms the decision below in *Fulton*, then it should grant this petition, vacate the judgment below, and remand for further consideration in light of *Fulton*.

Respectfully submitted,

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